United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

WILBUR K. MILLER

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BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15058 770

UNITED STATES OF AMERICA, APPELLANT,

v.

EPIFANIA P. VDA DE SUAREZ, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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United States Court of Appeals
For the
District of Columbia Circuit

FILED MAY 12 1959

Joseph W. Stewart
CLERK

No. 15058

QUESTION PRESENTED

Whether the six year statute of limitations for bringing suit on claims arising under the National Service Life Insurance Act was tolled in the instant case because the Veterans Administration, subsequent to its final administrative denial of appellee's claim, continued to acknowledge and respond to her communications.

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of the United States District Court for the District of Columbia, in which appellee was held entitled to the benefits of the $5,000 gratuitous National Service Life Insurance provided by Section 1 of the Act of July 11, 1942, 56 Stat. 657, 38 U.S.C. 802(d)(3)(B)(1952).[1] Appellee invoked the jurisdiction

[1] Title 38 ("Veterans Benefits") of the United States Code was enacted into positive law by the Act of September 2, 1958, Public Law 85-857, 85th Cong., 2d Sess., 72 Stat. 1105, and became effective on January 1, 1959. While the provisions of the National Service Life Insurance Act of 1940 with respect to gratuitous insurance benefits (38 U.S.C. 802(d) (1952)) were repealed by Section 14(75) of the Act of September 2, 1958, 72 Stat. 1105, 1172, and were not reenacted, its terms remain in effect with respect to appellee by virtue of the savings provision of 38 U.S.C. 788. (Title 38 does not yet appear in a bound supplement to the 1952 edition of the United States Code. It may be found in U. S. Code Cong. & Ad. News, Pamphlet No. 16, October 1, 1958.)

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of the District Court under Section 617 of the National Service Life Insurance Act of 1940, 54 Stat. 1014, 38 U.S.C. 817 (J. A. 2). The Government contested the jurisdiction of the District Court on the ground that suit was not brought within the applicable six year period set forth in Section 1 of the Act of May 29, 1928, 45 Stat. 964, 38 U.S.C. 445 (J. A. 5, 8). Judgment in favor the appellee was entered on November 6, 1958 (J. A. 41-42). Notice of appeal was filed on January 2, 1959 (J. A. 43). The jurisdiction of this Court rests upon 28 U.S.C. 1291.

STATEMENT OF THE CASE

Appellee's son, Ricardo P. Suarez, entered duty in the Armed Forces of the United States in the Philippines on December 8, 1941 (J. A. 2). He was captured on April 10, 1942, and remained a prisoner of war in a Japanese camp until his death on June 17, 1942 (J. A. 2). Pursuant to Section 1 of the Act of July 11, 1942, 56 Stat. 657, 38 U.S.C. 802 (d)(3)(B) (1952), *infra*, pp. 5-6, Ricardo, by reason of his prisoner of war status, was deemed to have applied for and to have been granted National Service Life Insurance in the amount of $5,000.

On April 25, 1947, appellee, the serviceman's mother, and Jovencio Suarez, the serviceman's father,[2] filed claim with the Veterans Administration to recover the insurance proceeds, (J. A. 3, 11-14). The claim was denied on April 3, 1952, by the Director, Dependents and Beneficiaries Claims Service of the Veterans Administration, on the ground that the evidence of record showed that, on the date of the serviceman's death, the claimants' income was sufficient for their reasonable maintenance and support; accordingly, they could not qualify as "dependent" parent-beneficiaries within the meaning of 38 U.S.C. 802 (d)(2) (1952), *infra*, p. 6, (J. A. 15-16). The letter of denial further advised appellee and her husband that they had the option of either appealing the decision to the Adminis-

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[2] Jovencio Suarez died prior to the institution of this action and, therefore, is not a party thereto.

trator of Veterans Affairs, or of instituting legal action (*ibid.*).

An appeal to the Administrator of Veterans Affairs was taken on November 6, 1952 (J. A. 9, 17-18). By letter dated March 18, 1953, the Board of Veterans Appeals denied the appeal (J. A. 19). The letter concluded with the following paragraph (J. A. 21):

> From a careful review of the entire record, the Board finds that the appellants have not shown that the income available to them at the time of the veteran's death was insufficient for their reasonable support and maintenance. Accordingly, they are not considered to have been dependent within the meaning of existing laws and regulations. The appeal is, accordingly, denied and this decision constitutes final administrative denial of this claim.

On May 12, 1953, appellee and her husband sent a "Petition" to the Director, Dependents and Beneficiaries Claims Service, of the Veterans Administration, requesting reconsideration of the denial of their claim (J. A. 23). On June 10, 1953, the Director replied in pertinent part as follows (J. A. 27-28):

> As you were informed by the Board of Veterans Appeals, the denial of your appeal constitutes final administrative action on your claim, and no further consideration by this office is in order.

On July 27, 1953, appellee and her husband wrote to the Board of Veterans Appeals requesting permission to present additional evidence in support of their claim (J. A. 29). After such permission was granted, and the evidence received, appellee and her husband were advised on November 12, 1953, that (J. A. 30-31):

> The evidence submitted has been considered but warrants no change in the previous action taken. The denial of your appeals from disallowance of your claims for National Service Life Insurance and death

compensation prior to January 1, 1949, constitutes final administrative action.

On March 29, 1954, and on August 11, 1954, appellee again requested reconsideration of the denial of her claim. The Veterans Administration responded on October 12, 1954, that (J. A. 33-34):

> As you have been previously informed, the denial of your appeal constitutes final administrative action on your claim. No further action may therefore be taken.

Appellee's final request for reconsideration was forwarded on November 23, 1954 (J. A. 35). On December 27, 1954, she was sent the following letter by the Chairman of the Board of Veterans Appeals (J. A. 36):

> This will acknowledge receipt of your letter of November 23, 1954, regarding your insurance claim in the above-captioned case.
>
> The Board's determination was made on the record in its entirety that the evidence did not establish your dependency during the relevant period in question and the appeal was denied.
>
> It is provided by law that claim for benefits administered by this Administration are subject to one review on appeal to this Board. Since such review has been accorded your claim, no further action is indicated by this office.

Appellee brought this action in the District Court on February 14, 1956 (J. A. 1-4). Invoking the jurisdiction of the court under 38 U.S.C. 817[3] (J. A. 2), appellee alleged that her claim for the insurance benefits had been filed with the Veterans Administration on April 25, 1947, "and was continuously under consideration until the said claim was fully denied on December 27, 1954 * * *" (J. A.

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[3] Section 617 of the National Service Life Insurance Act of 1940, 54 Stat. 1014.

3). She further alleged that, as the dependent mother of the insured, she was entitled to recover the $5,000 automatic insurance that had been granted him (J. A. 3).

The Government answered the complaint raising, *inter alia,* the defense that the suit had not been brought within the six-year period of limitations set forth in 38 U.S.C. 445 (J. A. 5). In advance of trial, the Government filed a motion to dismiss or in the alternative for summary judgment grounded upon the appellee's failure to institute the action within the statutory time period (J. A. 8). This motion was denied by the District Court (J. A. 37). After subsequent trial on the merits,[4] the court concluded that the appellee had established her entitlement to the insurance proceeds (J. A. 39). On the threshold issue as to when the final administrative denial of the appellee's claim had been made, the court expressly found that the claim had been "continuously under consideration" until December 27, 1954 (J. A. 39). This was the date on which the agency had acknowledged, and responded to, the most recent letter of the appellee (*supra,* p. 4) and, if regarded as representing the final administrative denial of appellee's claim, renders the suit timely by four days.[5]

This appeal followed (J. A. 43).

STATUTES INVOLVED

1. The National Service Life Insurance Act of 1940, 54 Stat. 1008, as amended, 38 U.S.C. 801-818 (1952), provided in pertinent part as follows (as it appears in the United States Code):

38 U.S.C. 802(d)(3)(B):

> Any person in the active service who on or after December 7, 1941, and prior to April 20, 1942, has been or shall be captured, besieged, or otherwise isolated by the forces of an enemy of the United States for a period of at least thirty consecutive days and extending beyond

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[4] All of the testimony was taken by deposition in the Philippines.

[5] See, *infra,* p. 15, fn 13.

April 19, 1942, and at the time of such capture, siege, or isolation by the enemy did not have in force insurance in the aggregate amount of at least $5,000 under the War Risk Insurance Act, as amended, the World War Veterans' Act, 1924, as amended, or this subchapter, shall be deemed to have applied for and to have been granted, effective as of the date of such capture, siege or isolation, National Service Life Insurance in an amount which together with any such insurance then in force shall aggregate $5,000 of insurance * * *.

38 U.S.C. 802 (d)(5):

If any person deemed to have been issued insurance under subsection (d)(3)(A) or (B) of this section dies without filing application and within the time limited therefor, death insurance benefits shall be payable in the manner and to the persons as stated in subsection (d)(2) * * *

38 U.S.C. 802 (d)(2):

* * * payments hereunder shall be made only to the following beneficiaries and in the order named—

* * * * *

(C) if no widow or widower entitled thereto, or child, to the dependent mother or father of the insured, if living, in equal shares * * *.

38 U.S.C. 817:

In the event of disagreement as to any claim arising under this subchapter, suit may be brought in the same manner and subject to the same conditions and limitations as are applicable to the United States Government life (converted) insurance under the provisions of sections 445 and 551 of this title.

2. Section 19 of the World War Veterans' Act, 1924, 43 Stat. 612, as amended (38 U.S.C. 445), provides in pertinent part as follows (as it appears in the United States Code):

38 U.S.C. 445:

In the event of disagreement as to claim, including claim for refund of premiums, under a contract of insurance between the Veterans' Administration and any person or persons claiming thereunder an action on the claim may be brought against the United States * * *.

* * * * *

No suit on yearly renewable term insurance shall be allowed under this section unless the same shall have been brought within six years after the right accrued for which the claim is made * * * *Provided,* That for the purposes of this section it shall be deemed that the right accrued on the happening of the contingency in which the claim is founded: *Provided further,* That this limitation is suspended for the period elapsing between the filing in the Veterans' Administration of the claim sued upon and the denial of said claim by the Administrator of Veterans' Affairs. Infants, insane persons, or persons under other legal disability, or persons rated as incompetent or insane by the Veterans' Administration shall have three years in which to bring suit after the removal of their disabilities. * * *

The term "claim", as used in this section, means any writing which alleges permanent and total disability at a time when the contract of insurance was in force, or which uses words showing an intention to claim insurance benefits, and the term "disagreement" means a denial of the claim by the Administrator of Veterans' Affairs or someone acting in his name on an appeal to the Administrator. * * *

STATEMENT OF POINTS

1. The District Court erred in failing to dismiss the appellee's suit as time-barred by the six year period of limitations set forth in 38 U.S.C. 445.

2. The District Court erred in holding that the appellee's claim for insurance benefits was continously under consideration by the Veterans Administration until December 27, 1954.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Government does not here challenge the District Court's holding, based upon the depositional evidence adduced at trial, that the appellee qualifies as a dependent parent of the insured. Our sole concern on this appeal is with the failure of the District Court to respect the clear statutory time limitation which has been imposed by the Congress in connection with its allowance of suits on claims arising, as here, under the National Service Life Insurance Act.

38 U.S.C. 445, the relevant statute, *supra*, p. 7 prescribes, as we show in Part A, a strict six-year time limitation within which suit must be brought. This time limitation is jurisdictional and hence operates as a firm condition precedent upon the power of the court to entertain the action. *Munro* v. *United States*, 303 U.S. 36; *Morgan* v. *United States*, 115 F. 2d 427 (C.A. 5), certiorari denied, 312 U.S. 701. Despite the definite time period which the statute fixes for the bringing of suit, 38 U.S.C. 445 further provides, as we show in Part B, that the running of the period is suspended "for the period elapsing between the filing in the Veterans Administration of the claim sued upon and the denial of said claim". In *Rosario* v. *United States*, 70 App. D.C. 323, 106 F. 2d 844, certiorari denied, 308 U.S. 606, this Court, relying upon an earlier Eighth Circuit decision, *United States* v. *Bollman*, 73 F. 2d 133, held that the running of the period of limitations would continue to be suspended if, subsequent to the initial denial of the claim, the Veterans Administration acted "in a manner which would lead the claimant reasonably to believe that it is holding the matter open." Grounded upon the notion that the claimant would refrain from bringing suit so long as he could reasonably assume that his claim was still being considered by the Veterans Administration, *Rosario* im-

posed upon the agency the duty of clearly apprising the claimant that his claim was finally and definitely denied.

As we demonstrate in Part C, that duty was fulfilled by the Veterans Administration in this case prior to December 27, 1954—the date chosen by the District Court as representing the final administrative denial. We do not believe it consistent with the congressional purpose underlying a period of limitation for a claimant to suspend continuously the running of the statute merely by repeatedly addressing communications to the agency subsequent to an unequivocal final denial. Nor should the fact that the Veterans Administration, rather than ignoring each communication, has chosen courteously to acknowledge it and to advise the claimant of its continued adherence to its ruling, serve as a basis for suspension of the statute.

ARGUMENT

The District Court Erred in Failing to Dismiss This Action as Time-Barred Under the Controlling Statute of Limitations

A. *The Statutory Provisions.* The only statute authorizing suit to be brought against the United States on any claim involving National Service Life Insurance is Section 617 of the National Service Life Insurance Act of 1940, as amended, 38 U.S.C. 817, *supra,* p. 6. That section provides that in event of disagreement as to any claim arising under such Act, suit may be brought in the same manner and subject to the same conditions and limitations applicable to United States Government life (converted) insurance under the provisions of Section 19 of the World War Veterans' Act, 1924, as amended, 38 U.S.C. 445, *supra,* p. 7.

The provisions of 38 U.S.C. 445, which are controlling here, in turn provide that no suit shall be allowed "unless the same shall have been brought within six years after the right accrued for which the claim is made",[6] and that the

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[6] The requirement that suit be brought within a specified time was first added to the jurisdictional statute by Section 1 of the Act of May 29, 1928, 45 Stat. 964. The purpose of the amendment

right accrues "on the happening of the contingency on which the claim is founded."[7] Although the statute fixes a definite time within which suit must be brought, it also provides that the running of the period of limitations "is suspended for the period elapsing between the filing in the Veterans Administration of the claim sued upon and the denial of said claim." 38 U.S.C. 445.

38 U.S.C. 445 has been consistently interpreted as being not an ordinary statute of limitations, but rather a firm condition precedent upon the power of the court to entertain a suit for insurance benefits. Thus, a plaintiff is required to establish facts showing timely suit in order to make out a *prima facie* case. *Lynch* v. *United States,* 80 F. 2d 418 (C.A. 5), certiorari denied, 298 U.S. 658. And, the failure to bring an action within the statute's specified time period will operate as a bar to judgment even though the statute was not pleaded by the Government. *Morgan* v. *United States,* 115 F. 2d 427 (C.A. 5), certiorari denied, 312 U.S. 701. Indeed, government attorneys have been expressly held by the Supreme Court to be without authority to waive the limitations imposed by the statute. *Munro* v. *United States,* 303 U.S. 36.

The jurisdictional nature of the time limitation is further underscored by the fact that the issue may be raised for the first time on appeal or after the entry of judgment, *United States* v. *Mills,* 91 F. 2d 487 (C.A. 6), and, moreover, may not be abrogated by estoppel. *Roskos* v. *United States,* 130 F. 2d 751 (C.A. 3), certiorari denied, 317 U.S. 696. In

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was to establish a uniform period of limitations (6 years) in lieu of the varying periods of limitation (3-20 years) found in state statutes theretofore made applicable to insurance actions by the Conformity Act. See *United States* v. *Towery,* 306 U.S. 324; *United States* v. *Wallace,* 123 F. 2d 484 (C.A. 10); H. Rept. No. 1274, 70th Cong., 1st Sess., p. 1; S. Rept. No. 1297, 70th Cong., 1st Sess., p. 1.

[7] Since policies of National Service Life Insurance mature only on death, it is this contingency, *i.e.* the death of the insured on June 7, 1942, upon which appellee's claim is indisputably founded. See *Riley* v. *United States,* 212 F. 2d 692 (C.A. 4); cf. *United States* v. *Towery,* 306 U.S. 324.

short, as the Tenth Circuit observed in *United States* v. *Fitch,* 185 F. 2d 471, 474:

> The United States may be sued only in cases plainly within the terms of the authorizing statute [38 U.S.C. 445] and the courts cannot go beyond the letter of the consent given. * * * Statutes waiving the immunity to suit are strictly construed and Congress may grant the right with whatever restrictions it deems proper. * * *

B. *The Doctrine of "Continuing Negotiations".* As we have just described, the limitation provisions of 38 U.S.C. 445 impose a firm six-year period in which suit must be brought. The statute, however, is not without its softening feature. As previously noted, *supra,* p. 10, 38 U.S.C. 445 also provides that the running of the period of limitations "is suspended for the period elapsing between the filing in the Veterans Administration of the claim sued upon and the denial of said claim." In three appellate cases, including one from this Circuit, it has been held that an administrative denial of a claim would not be viewed as recommencing the running of the limitation period in circumstances where, subsequent to the denial, the Veterans Administration acted "in a manner which would lead the claimant reasonably to believe that it is holding the matter open * * *." *United States* v. *Bollman,* 73 F. 2d 133, 135 (C.A. 8); *Gambill* v. *United States,* 102 F. 2d 667 (C.A. 10); *Rosario* v. *United States,* 70 App. D.C. 323, 106 F. 2d 844, certiorari denied, 308 U.S. 606.

In *Bollman, supra,* where the doctrine was first enunciated, the Veterans Bureau, after having informed the claimant in 1926 that her claim had been denied, participated in continuing negotiations with the claimant which were directed to setting aside the Bureau's denial. For example, as late as October 12, 1931, there was a communication from the Bureau to the claimant's attorney which stated (73 F. 2d 133, at 135):

> "You are advised that the evidence submitted with your present communication is now receiving proper

right accrues "on the happening of the contingency on which the claim is founded."[7] Although the statute fixes a definite time within which suit must be brought, it also provides that the running of the period of limitations "is suspended for the period elapsing between the filing in the Veterans Administration of the claim sued upon and the denial of said claim." 38 U.S.C. 445.

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short, as the Tenth Circuit observed in *United States* v. *Fitch,* 185 F. 2d 471, 474:

> The United States may be sued only in cases plainly within the terms of the authorizing statute [38 U.S.C. 445] and the courts cannot go beyond the letter of the consent given. * * * Statutes waiving the immunity to suit are strictly construed and Congress may grant the right with whatever restrictions it deems proper. * * *

B. *The Doctrine of "Continuing Negotiations".* As we have just described, the limitation provisions of 38 U.S.C. 445 impose a firm six-year period in which suit must be brought. The statute, however, is not without its softening feature. As previously noted, *supra,* p. 10, 38 U.S.C. 445 also provides that the running of the period of limitations "is suspended for the period elapsing between the filing in the Veterans Administration of the claim sued upon and the denial of said claim." In three appellate cases, including one from this Circuit, it has been held that an administrative denial of a claim would not be viewed as recommencing the running of the limitation period in circumstances where, subsequent to the denial, the Veterans Administration acted "in a manner which would lead the claimant reasonably to believe that it is holding the matter open * * *." *United States* v. *Bollman,* 73 F. 2d 133, 135 (C.A. 8); *Gambill* v. *United States,* 102 F. 2d 667 (C.A. 10); *Rosario* v. *United States,* 70 App. D.C. 323, 106 F. 2d 844, certiorari denied, 308 U.S. 606.

In *Bollman, supra,* where the doctrine was first enunciated, the Veterans Bureau, after having informed the claimant in 1926 that her claim had been denied, participated in continuing negotiations with the claimant which were directed to setting aside the Bureau's denial. For example, as late as October 12, 1931, there was a communication from the Bureau to the claimant's attorney which stated (73 F. 2d 133, at 135):

> "You are advised that the evidence submitted with your present communication is now receiving proper

consideration and you will be communicated with relative thereto in due course."

It was not until December 1931, in a direct letter to the claimant, that the Bureau "definitely and finally adhered to its ruling." *Ibid.* The Court held that *(ibid.)*:

> * * * so long as this order was under serious discussion in the bureau and until it finally declined to reopen the matter the order should not be deemed final for application of limitations against suit. Obviously, it is to the interest of all parties that suits of this character be avoided. While the claimant may treat the action of the government in its order of disagreement as final, yet it may continue to discuss and contest the matter before the bureau. So long as the bureau treats or acts in a manner which would lead the claimant reasonably to believe that it is holding the matter open, we think it would be unjust to regard it as closed by the first order. The bureau can at any time definitely terminate such proceedings by stating that it declines to reopen and that its order is final. * * *

In this Court's *Rosario* decision, *supra*, p. 11, the Veterans Bureau had denied the plaintiff's claim in 1929. She then brought suit in the District Court in 1931. The Government defended on the ground that the 1929 denial was not final since it had not been signed by the Director of the Veterans Bureau nor by anyone acting in his name. Acceding to this defense, the plaintiff moved for dismisal of the action without prejudice and the action was so dismissed. After subsequent denial of the claim in 1935, plaintiff filed a new action in the same year. The Government urged that the claim had been finally denied in 1929 and, accordingly, the statute of limitations barred the new action. The Court held that the Bureau's letter to the plaintiff in 1929 did not constitute a denial since, as

then required by statute,[8] it had not been signed by the Director. The Court further declared that the suit based upon the subsequent denial was not untimely in view of negotiations carried on between the claimant and the Veterans Bureau subsequent to the initial denial.[9] Observing, for example, that the Director of Insurance had advised the claimant on July 16, 1931, "that the insurance feature of this case is being accorded consideration relative to which you will be further communicated with * * *,"[10] the Court, relying on *Ballman, supra,* p. 11 held that negotiations had continued beyond the 1929 denial and were not finally terminated until 1935.

In a recent decision, the United States District Court for the District of Columbia, relying on this Court's *Rosario* decision, similarly held that the statute of limitations would not run in circumstances where it appeared that both the claimant and the Veterans Administration "assumed the issue was still open." *De Pusana* v. *United States,* 164 F. Supp. 672, 675. In that case, which, as here, involved a claim for gratuitous insurance benefits, the Veterans Administration had initially denied the plaintiffs' claim on October 24, 1952. Subsequent to that date, however, the plaintiffs continued to forward to the Veterans Administration additional evidence in support of their

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[8] Act of May 29, 1928, 45 Stat. 964. The statute now provides for denial by the Administrator or any employee or agency of the Veterans Administration designated by him. Act of January 28, 1935, 49 Stat. 1, 38 U.S.C. 445 (c).

[9] The fact that the Government had asked for the dismissal of the plaintiff's previous suit on the ground that the 1929 denial was not final was undoubtedly an additional factor in the Court's decision. See *Simmons* v. *United States,* 110 F. 2d 296 (C.A. 4), rehearing denied, 111 F. 2d 618: "When the government pleaded the statute of limitations, in her subsequent suit, it was blowing both hot and cold, at the expense of the merits of the plaintiff's claim. Undoubtedly the strong elements of equitable estoppel inherent in such a set of facts strongly tincture the holding in the [*Rosario*] case." [111 F. 2d 618, at 619.]

[10] 70 App. D.C. 323, at 325, 106 F. 2d 844, at 846.

claim. After receiving the first additional evidence, the Veterans Administration sent the following letter to the claimants on May 28, 1953 (164 F. Supp. 672, 674):

> "* * * It is noted that you previously appealed to the Board of Veterans Appeals in connection with the disallowance of your claim for gratuitous National Service Life Insurance as dependent parent and that the Board denied your appeal on the ground that you were not dependent at the time of the veteran's death. The evidence which you have submitted has been carefully considered together with all the other evidence on record and it is hereby determined that no change in the prior disallowance of your claim for insurance is warranted."

After receiving further additional evidence forwarded shortly thereafter, the Veterans Administration advised the claimants on January 28, 1954, that (*ibid.*):

> "The additional evidence submitted by you has been carefully considered together with all other evidence of record and it has been determined that no change in the prior disallowance of your claim is warranted."

Because it appeared reasonably certain to the District Court that the Veterans Administration had considered the matter open and had reviewed all of the evidence before arriving at the decision expressed in the letter of January 28, 1954, the court held that the statute of limitations was suspended until that date.[11]

The rationale of the doctrine of "continuing negotiations" as set forth in the foregoing cases is simply that, when the claimant continues to correspond with the Veterans Administration after receiving a denial of his claim and the Veterans Administration participates in such correspondence, without indicating to the claimant that its previous order is final and that further administrative action will

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[11] No appeal from that decision was taken by the Government.

not be taken, there is a danger that the claimant will be lulled into refraining from pursuing his right of judicial review. As stated by Judge Youngdahl in *De Pusana* (164 F. Supp. at 675):

> * * * [I]t would be possible for the Veterans Administration to mislead unsuspecting claimants by holding out the possibility of changing its decision and obviating the necessity of court action.

Giving full weight in this case [12] to the considerations of fairness underlying the doctrine of continuing negotiations, we respectfully submit (and we shall now show) that appellee's suit was still time barred and should have been dismissed by the District Court.

C. *Appellee's Claim for Insurance Benefits Was Not "Continuously Under Consideration" by the Veterans Administration Until December 27, 1954.* There appears to be no dispute that, if the agency letter of December 27, 1954, is not regarded as the final administrative denial, appellee's suit would be time barred.[13] A brief recapitulation of the administrative sequence of events will demonstrate, we believe, that appellee's claim had been finally denied well before that date.

The initial decision of the Veterans Administration was rendered on April 3, 1952. Following an appeal to the

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[12] But see, *e.g. Simmons* v. *United States,* 111 F. 2d 618, 619 (C.A. 4), denying rehearing of 110 F. 2d 296; *Neely* v. *United States,* 115 F. 2d 448, 452 (C.A. 4).

[13] The statute began to run on June 17, 1942, the date of the insured's death. See, *supra,* p. 2. The claim was filed in the Veterans Administration on April 25, 1947; the running of the six year period accordingly was suspended on that date, *i.e.,* 4 years, 10 months and 8 days after the insured's death. Hence appellee had 1 year, 1 month and 22 days within which suit could be brought after the final administrative denial of her claim. If December 27, 1954, is treated as the date of such denial, the suit which was instituted on February 14, 1956 (1 year, 1 month and 18 days after December 27, 1954), was timely by four days.

Administrator of Veterans Affairs, to which appellee was entitled,[14] she was advised by letter of March 18, 1953, that her appeal had been denied. The concluding sentence of that letter informed appellee that "* * * this decision constitutes final administrative denial of this claim." (J. A. 21). While we think that this letter, as well as the next agency letter of June 10, 1953,[15] which was sent to appellee in response to her petition for reconsideration, was unequivocal, and should not have reasonably misled the appellee into believing that her claim was still under consideration, we believe that the agency's subsequent consideration of the additional evidence forwarded by the appellee might reasonably have had that effect. However, when appellee was then advised on November 12, 1953, that the additional evidence had been considered and warranted "no change in the previous action taken", as well as the fact that such action constituted "final administrative action" (J. A. 31), we think that, at that time, she was clearly apprised of the administrative finality of her claim. And, if any doubt as to that lingered, it surely should have been dispelled by the agency's response of October 12, 1954, to further letters from her. At that time the Veterans Administration again pointed out that (J. A. 34):

> As you have been previously informed, the denial of your appeal constitutes final administrative action on your claim. No further action may therefore be taken.

There can be no question, in our view, that the agency, neither in its letter of November 12, 1953, nor in its letter of October 12, 1954, had acted in a manner "which would

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[14] See 38 U.S.C. ch. 12a, Part II; 38 C.F.R. § 19.

[15] It will be remembered that this letter recited (J.A. 27-28):

> As you were informed by the Board of Veterans Appeals, the denial of your appeal constitutes final administrative action on your claim, and no further consideration by this office is in order.

lead the claimant reasonably to believe that it is holding the matter open". See *United States* v. *Bollman,* 73 F. 2d 133, 135 (C.A. 8); *Rosario* v. *United States,* 70 App. D.C. 323, 328, 106 F.2d 844, 849. Indeed, there was nothing more that the agency should do to make clear to the appellee that further administrative action was precluded. Certainly, the last of the agency's letters, *i.e.,* the one of December 27, 1954, apprised the appellee of nothing more than she had already been told, and yet this letter was chosen by the District Court to represent the final administrative determination. It is not unreasonable to assume, we believe, that, on this record, if appellee had chosen to continue corresponding with the agency beyond December 27, 1954, the District Court would have in all likelihood selected the last of the agency's letters, regardless of the language of the previous ones, as the date of the final administrative determination. This result, we submit, frustrates the congressional purpose behind the creation of a period of limitation. There would never, in the real sense, be any repose of a claim if a claimant were permitted, through repeated submission of petitions for reconsideration, or through continuation of correspondence with the agency, indefinitely to suspend the running of the statute of limitations merely because of the agency's practice of courteously acknowledging and responding to each communication addressed to it.

There is, of course, nothing in the statute which prevents the Veterans Administration from reconsidering, in its discretion, a claim which has previously been finally denied. But, as numerous courts have held,[16] the discretion residing

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[16] *Maxwell* v. *United States,* 141 F. 2d 139 (C.A. 7); *Roskos* v. *United States,* 130 F. 2d 751 (C.A. 3), certiorari denied, 317 U.S. 696; *Stulce* v. *United States,* 128 F. 2d 327 (C.A. 8); *Simmons* v. *United States,* 111 F. 2d 618 (C.A. 4), denying rehearing of 110 F. 2d 296; *Ball* v. *United States,* 101 F. 2d 272 (C.A. 6), certiorari denied, 308 U.S. 563; *Jenkins* v. *United States,* 86 F. 2d 123 (C.A. 5), certiorari denied, 300 U.S. 675; see, also, *United States* v. *Kelley,* 110 F. 2d 922 (C.A. 8), certiorari denied, 311 U.S. 669; *Dyer* v. *United States,* 81 U.S. App. D.C. 4, 154 F. 2d 14, certiorari denied, 329 U.S. 722.

in the Veterans Administration to reconsider such claims does not have the effect of vitiating the statutory limitation concerning the bringing of suit. "It was not the intention of Congress that the granting of administrative discretion to the Administrator of Veterans' Affairs for the reconsidering of claims theretofore denied should result in defeating the provisions of the statute [of limitations]. No such intention is expressed, nor can it be implied." *Ball* v. *United States,* 101 F. 2d 272, 274 (C.A. 6), certiorari denied, 308 U.S. 563.

It is clear, therefore, even from those cases which have adopted the "continuing negotiation" doctrine, that the suspension of the running of the statute is terminated once the Veterans Administration has decisively apprised the claimant of the final denial of her claim. That this was accomplished in the present case at least thirteen months prior to December 27, 1954, is, we believe, fully demonstrated by the record. Accordingly, the instant action was barred by the statute of limitations and should have been dismissed by the District Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court should be reversed and the case remanded to that court with instructions to dismiss the complaint.

George Cochran Doub,
Assistant Attorney General.

Oliver Gasch,
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CHAMBERS OF JUDGE BAZELON

7-7-59

BRIEF FOR THE APPELLEE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit

FILED MAY 25 1959

Joseph W. Stewart
CLERK

No. 15,058

United States of America, Appellant,

v.

Epifania P. Vda De Suarez, Appellee.

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Claude L. Dawson
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Washington 5, D. C.

No. 15,058

QUESTION PRESENTED

Whether this action was barred by the Statute of Limitations at the time the action was filed.

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA.

No. 15,058

United States of America, Appellant

v.

Epifania P. Vda De Suarez, Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA.

BRIEF FOR THE APPELLEE

JURISDICTIONAL STATEMENT

The jurisdictional statement of the Appellant is accepted. However, attention of the Court is directed to the Notice of Appeal set forth on page 46 of the so-called Joint Appendix. This notice is signed "Ellen Lee Park, defendant", and by Ellen Lee Park, "Attorney for the Assistant United States Attorney". Ellen Lee Park was not a defendant in this action. It is possible that it may have been an error of the printer which counsel for the Appellant should explain. If it is not an error, then the appeal taken should be dismissed for want of a proper notice of appeal.

STATEMENT OF THE CASE

The Statement of the Appellant as to the facts in the case is accepted.

STATUTES INVOLVED

The statement of the Appellant as to the statutes involved is accepted by the Appellee.

STATEMENT OF POINTS ON APPEAL

1. The findings of fact made by the Court below (JA 38-39) cannot be set aside unless they are clearly erroneous.

2. The statutes granting insurance to members of the armed forces of the United States are entitled to be liberally construed.

3. The action filed by the Appellee was clearly not barred by the Statute of Limitations.

Each of these points will be separately discussed.

POINT 1.

The Court below found (JA.39) as fact from the evidence that the claim of the Appellee was filed on April 25, 1947 with the U. S. Veterans Administration, and that the same was continuously under consideration until December 27, 1954 (Finding No. 6 JA.39).

This case was tried to the Court without a jury (Ja. 38), and the findings of the Court are presumed to be correct and they cannot be set aside unless they are clearly erroneous.

District of Columbia v Pace, 320 U.S. 98, 88 L.Ed. 408, affirming 77 App. D.C. 332, 135 F.2d 249.

Adamson v Gililand, 242 U.S. 350, 61 L.Ed. 356.

Storley v Armour & Co., 107 F.2d 8th CCA.

The record clearly shows that the last denial of the claim of the Appellee was made on December 27, 1954 (JA. 36) by the Chairman of the Board of Appeals who was the only official in the U. S. Veterans Administration to finally state that no further consideration would be given to the claim.

POINT 2.

It has been a universal rule of law that the insurance granted to members of the Armed Forces under the statutes should receive a liberal construction to effect the will of Congress.

United States v Vineyard, 71 F.2d 624 5th CCA

Ford v United States, 44 F.2d 754 1st CCA

United States v Phillips, 44 F.2d 689 8th CCA

United States v Eliasson, 20 F.2d 821 9th CCA

United States v Martin, 52 F.2d 406 5th CCA

Point 3.

This action was not barred by the statute of limitations on the date that this action was filed.

The Statute of Limitations applicable to this action is quoted on page 7 of the Appellant's brief. It is quoted again for the convenience of the Court.

> "No suit on yearly renewable term insurance shall be allowed under this section unless the same shall have been brought within six years after the right accrued for which the claim is made * * * Provided, That for the purposes of this section it shall be deemed that the right accrued on the happening of the contingency in which the claim is founded: Provided further, That this limitation is suspended for the period elapsing between the filing in the Veterans' Administration of the claim sued upon and the denial of said claim by the Administrator of Veterans' Affairs. Infants, insane persons, or persons under other legal disability, or persons rated as incompetent or insane by the Veterans' Administration shall have three years in which to bring suit after the removal of their disabilities.***"

The death of the insured took place on June 17, 1942 (JA. 38-Finding 2). The Appellant takes the position that the statute was set in motion on the date of the death of the insured. This despite the fact that the Appellee was under a "legal disability" at that time.

At the very outset the Appellee invites the Court's attention to the fact that the Court below found as a fact that the claim of the Appellee filed on April 25, 1947 was continuously under consideration by the United States Veterans Administration until December 27, 1954. It is admitted in the brief of the Appellant that if this finding of fact is correct that the action was timely filed. (Footnote P. 15 of Brief)

Let us now examine the evidence pertaining to the Statute of Limitations. It is admitted that the claim of the Appellee was filed on April 25, 1947 (Footnote P. 15 Brief). The Board of Veterans Appeals rendered a decision on March 18, 1953 (JA. 20). Reconsideration was requested on May 12, 1953 (JA. 22-23-25-26). Appellee was advised that the new evidence was being considered on June 10, 1953 (JA. 27). Appellee was advised that the evidence had been considered on November 12, 1953 (JA. 30-31). This advice was by the Acting Chief of the Dependents Division. Reconsideration was requested on March 29, 1954, (JA. 32) and no reply was made until October 12, 1954(JA.33-34)

On November 23, 1954, a letter was addressed by the Appellee to the Chairman of the Board of Appeals (J.A. 35), and then for the first time the evidence that the Appellee forwarded with the letter of June 10, 1953 which was answered by the letter of acting Chief of the Dependents Claim Division was considered by the Board of Appeals (JA. 36) and denied.

This fact is most important. The regulations and the rules governing the decisions of the Board of Appeals provide that where a claim for insurance has once been considered by the Board of Appeals and Review, the highest appellate group in the Veterans Administration except as to the Administrator of Veterans Affairs, that their decision cannot be changed or altered and that any new evidence furnished by a claimant must be submitted to the Board of Veterans Appeals. When the evidence was forwarded to the Veterans Administration under date of June 10, 1953 (JA. 20) it was the duty of the Chief of the Dependents Claim Division to forward that evidence to the Board of Veterans Appeals for reconsideration. This was not done, and the first time that such evidence was considered was when the letter of December 27, 1954 (JA. 36) was written. It is therefore clear that this action was not barred by limitations as is contended by the Appellant.

See Rosario v United States, 130 F.2d 844, 70 App. D.C. 323, certiorari denied 308 U.S. 606.

The facts in this case are such that this Court cannot conclude that the finding of the Court below that the claim of the Appellee was continuously under consideration was clearly erroneous. The findings clearly conform to the proof adduced below.

THE APPELLANT DOES NOT PROPERLY COMPUTE THE PERIOD OF LIMITATIONS.

The Appellant takes the position that the statute of limitations commenced to run from the date of death (footnote P. 15 brief).

In taking this position the Appellant is clearly in error and absolutely ignores the language of the statute. Attention of the Court is directed to the following language of the statute:

"Infants, insane persons, or persons under other legal disability, or persons rated as incompetent or insane by the Veterans Administration shall have three years in which to bring suit after the removal of their disabilities."

The words "persons under a legal disability" has been defined by the Courts.

Words & Phrases Judicially Defined Vol. 24, pages 538, 539, and Cumulative Index (1959)

Historically, persons subject to a "legal disability" which would toll the statute against them were married women, infants, insane persons and persons beyond the sea.

Marcos v United States, 122 Court Claims 641, 106 Fed. Supp. 172, 175.

In the case above, suit was brought in the Court of Claims to recover the value of cattle furnished the Armed Forces of the United States in the Philippine Islands. The Court held that the statute of limitations was suspended during the period of World War II, basing its decision principally upon a decision of the Supreme Court of the United States in the case of Menger v Abbott, 6 Wall. 532, 539 from which a portion of the opinion is quoted in the decision in the Marcos case. Government counsel in the Marcos case admitted that the war suspended the statute of limitations. Judge Whittier dissented in the Marcos case principally on the grounds that the section of the Statute Of Limitations provided the same three year statute for persons under legal disability. The Court in the Marcos case held the statute of limitations was suspended until the date of the surrender of the Japanese.

Sese v United States, 125 Court of Claims 526, and see the case of Silva v United States, 125 Court of Claims 550 to the same effect.

Tan et al v United States, 122 Court of Claims 662

These cases have not been overruled by the Supreme Court of the United States on the question of bringing an action within three years after the removal of the legal disabilities.

See the case of Soriano v United States, 352 U.S. 270, 1 L.Ed. 2nd 306, where the Supreme Court did not consider the three year statute.

Applying the language of the statute to this case the statute of limitations did not in any event commence to run until September 2, 1945 the date of the surrender of the Japanese in the Philippine Islands. The statute further provided that upon the filing of the claim for insurance the statute is suspended pending proceedings in the Veterans Administration. The claim was filed on April 25, 1947 (JA. 39 findings). The statute ran from September 2, 1945 and ran until April 25, 1947. This was for a period of one year and 225 days. Therefore when the claim was filed on April 25, 1947 there remained a period of one year; and 140 days in which the statute had not yet run.

Under the opinion of this Court in the case of Rosario v United States, supra, this Court said that the Veterans Administration could, by advising the claimant that no further consideration would be given to the claim, commence the running of the statute. They had considered the evidence submitted and so advised the Appellee in a letter of November 12, 1953 (JA. 30-31) but they did not definitely advise the Appellee that no further consideration would be given until October 12, 1954 (JA. 33-34).

Even conceding that this letter constituted a final denial, which of course it did not because it was not written by the Chairman of the Board of Veterans Appeals, the statute had not run. The Appellee had one year and 140 days after October 12, 1954 in which to file suit. Suit was filed within one year and 125 days after the denial of October 12, 1954 on February 14, 1956 (Ja. 1).

It has already been invited to the attention of this Court that the statutes governing the granting of insurance to members of the Armed Forces are entitled to a liberal construction.

CONCLUSION

This insurance is payable only to the Appellant, if she dies before this case is heard or before payment is made no payments may be made to any one under the statute. I have searched my mind for a reasonable theory why this cruel appeal was taken, and the delay in the Court below.

It would be impossible for any American to live in the poverty of this Appellee. An entire family existed upon about $15.00 a month the most of which the insured contributed. The action of the Veterans Administration officials in denying this just claim um should make them blush in shame. There is little justification for this cruel appeal. We spend billions of dollars for goodwill overseas, and yet we deny to this poverty stricken Appellee the amount of insurance justly due her during her lifetime.

If this country owes anything, it does to the dependents of those who died for this country. Claims of this nature should not be decided upon technical grounds nor defeated by misapplication of the statutes involved. Unless this Court wants to reverse its decision in the case of Rosario v United States, the judgment below should be affirmed.

Respectfully Submitted,

Claude L. Rowe,
Attorney, Appellee

6-8-

REPLY BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15058

UNITED STATES OF AMERICA, APPELLANT

v.

EPIFANIA P. VDA DE SUAREZ, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

GEORGE COCHRAN DOUB,
Assistant Attorney General,
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United States Court of Appeals
For the
District of Columbia Circuit

FILED JUN 8 1959

Joseph W. Stewart

CLERK

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15058

UNITED STATES OF AMERICA, APPELLANT

v.

EPIFANIA P. VDA DE SUAREZ, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANT

1. Appellee now urges (Br. 4–6), contrary to her position in the court below, that the statute of limitations (38 U.S.C. 445) did not begin to run on the date of the insured's death, *i.e.*, June 17, 1942.[1] It is appellee's position at this time that World War II created a "legal disability" which suspended

[1] In the district court, appellee clearly recognized that the statute of limitations began to run on June 17, 1942. In her "Points and Authorities in Opposition to Motion to Dismiss", appellee stated:

"The government has pleaded the statute of limitations in this case.

"The facts are as follows: The insured, Ricardo, died on June 17, 1942. Claim was filed for the insurance on April 25, 1947. Claim was finally denied by the Veterans Administration on December 27, 1954. Suit was filed on February 14, 1956. When the claim was filed on April 25, 1947, the statute of limitations still had one year and 53 days left of the six year statute. The statute was tolled during the consideration of the claim. Assuming that the statute of limitations commenced to run on December 27, 1954, it did not expire until one year and 53 days thereafter. This would include one year to December 27, 1955, four days in December, 1955, 31 days in January, 1956, and 18 days in February, 1956. Suit was filed on February 14, 1956, four days before the expiration of the statute.

"This claim is not barred by limitations."

the running of the statute[2] until September 2, 1945, when hostilities ceased with Japan. Chief reliance is placed upon the decision of the Court of Claims in *Marcos* v. *United States*, 122 C. Cls. 641, which, in appellee's words (Br. 5), was "[based] * * * principally upon a decision of the Supreme Court of the United States in the case of *Hanger* v. *Abbott*, 6 Wall. 532, 539 * * *."

Appellee apparently overlooks the fact that the Supreme Court in *Soriano* v. *United States*, 352 U.S. 270, rejected *Hanger v. Abbott* as having "no applicability to claims against the sovereign" (*id.* at 275). And the Court in *Soriano* expressly held that, in the absence of specific legislation, the existence of hostilities would not be regarded as creating a legal disability so as to toll a statute of limitations prescribed by Congress. In language peculiarly pertinent here, the Court stated (352 U.S. 275–276):

> To permit the application of the doctrine urged by petitioner would impose the tolling of the statute in every time-limit-consent Act passed by the Congress. For example, statutes permitting suits for tax refunds, tort actions, alien property litigation, patent cases, and other claims against the Government would all be affected. Strangely enough, Congress would be required to provide expressly in each statute that the period of limitation was not to be extended by war. But Congress was entitled to assume that the limitation period it prescribed meant just that period and no more. With this

---

[2] In pertinent part, 38 U.S.C. 445, provides:

No suit on yearly renewable term insurance shall be allowed under this section unless the same shall have been brought within six years after the right accrued for which the claim is made * * * *Provided*, That for the purposes of this section it shall be deemed that the right accrued on the happening of the contingency in which the claim is founded: *Provided further*, That this limitation is suspended for the period elapsing between the filing in the Veterans' Administration of the claim sued upon and the denial of said claim by the Administrator of Veterans' Affairs. *Infants, insane persons, or persons under other legal disability, or persons rated as incompetent or insane by the Veterans' Administration shall have three years in which to bring suit after the removal of their disabilities.* * * * (Emphasis added.)

> intent in mind, Congress has passed specific legislation each time it has seen fit to toll such statutes of limitations because of war. And this Court has long decided that limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied. *United States* v. *Sherwood,* 312 U.S. 584, 590–591 (1941), and cases there cited. * * *

2. Even if, despite the foregoing, the existence of hostilities were viewed as creating a "legal disability" within the meaning of the proviso in 38 U.S.C. 445, *supra,* p. 2, fn. 2, appellee's action would still be time barred. Under that proviso, suit is required to be brought within three years after removal of the disability. Appellee's claim with the Veterans' Administration was filed on April 25, 1947, nineteen months and twenty-three days after the cessation of hostilities on September 2, 1945. Hence, appellee had sixteen months and seven days after the final administrative denial of her claim within which to bring suit. However, as noted in our main brief (pp. 15–18), the very latest date which can reasonably be regarded as the date of the final administrative denial was November 12, 1953—the date on which appellee was advised that her additional evidence had been considered, but warranted "no change in the previous action taken" (J.A. 31). Suit was not brought until February 14, 1956, which was twenty-seven months and two days after the final administrative denial. Thus, even assuming the "legal disability" proviso were applicable, the action was still out of time by almost eleven months.[3]

---

[3] Appellee is in error in suggesting (Br. 4) that "the regulations and rules governing the decisions of the Board of Appeals" required automatic submission of her additional evidence to the Board of Veterans' Appeals, despite the fact that the Board had already reviewed her case on appeal. We are aware of no such regulation or rule, nor has any been cited by the appellee. On the contrary, the applicable regulations expressly declared that, with exceptions not relevant here, appellee's claim was subject only to "*one* review on appeal to the Administrator of Veterans' Affairs, decisions in such cases to be made by the Board of Veterans' Appeals." 38 U.S.C. (1952 ed.), ch. 12A, Part II, II, pp. 5591–5592. (Emphasis added.)

CONCLUSION

For the above reasons, and those stated in our main brief, we respectfully submit that the judgment of the district court should be reversed and the case remanded to that court with instructions to dismiss the complaint.

GEORGE COCHRAN DOUB,
Assistant Attorney General,
OLIVER GASCH,
United States Attorney,
SAMUEL D. SLADE,
SEYMOUR FARBER,
Attorneys,
Department of Justice.

U.S. GOVERNMENT PRINTING OFFICE: 1959

JOINT APPENDIX

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15058

UNITED STATES OF AMERICA, APPELLANT,

v.

EPIFANIA P. VDA DE SUAREZ, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

770

United States Court of Appeals
For the
District of Columbia Circuit

FILED MAY 12 1959

Joseph W. Stewart

CLERK

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15058

UNITED STATES OF AMERICA, APPELLANT,

v.

EPIFANIA P. VDA DE SUAREZ, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JOINT APPENDIX

COMPLAINT

(Filed February 14, 1956)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 659-56

EPIFANIA P. VDA DE SUAREZ FABRICA, NEGROS OCCIDENTAL, PHILIPPINE ISLANDS, PLAINTIFF,

v.

UNITED STATES OF AMERICA, DEFENDANT

SUIT ON AUTOMATIC INSURANCE GRANTED UNDER THE NATIONAL SERVICE LIFE INSURANCE ACT

The plaintiff for her cause of action complains of the defendant and alleges:

1. That the plaintiff is a citizen of and a resident of the Republic of the Philippine Islands and brings this action in her own right.

2. That this suit is brought against the said defendant pursuant to the provisions of Section 817 of Title 38 of the U. S. Code.

3. The plaintiff further alleges that she is the mother of one Ricardo Suarez who enlisted in the Army of the United States and was called to active service on December 8, 1941 in the Philippine Islands and died while so serving in the active service on June 17, 1942.

4. The plaintiff alleges that this suit is brought based upon the provisions of 802(B) of Title 38 of the U. S. Code which provides as follows:

> "Any person in the active service who on or after December 7, 1941, and prior to April 20, 1942, has been or shall be captured, besieged, or otherwise isolated by the forces of an enemy of the United States for a period of at least thirty consecutive days and extending beyond April 19, 1942, and at the time of such capture, siege, or isolation by the enemy did not have in force insurance in the aggregate amount of at least $5,000 under the War Risk Insurance Act, as amended, the World War Veterans' Act, 1924, as amended, or this subchapter, shall be deemed to have applied for and to have been granted, effective as of the date of such capture, siege, or isolation, National Service Life Insurance in an amount which together with any such insurance then in force shall aggregate $5,000 of insurance, and such insurance shall remain in force and premiums on such insurance shall be waived during the period while such person remains so captured, besieged, or isolated, and for six months thereafter: Provided, That such protection shall cease and terminate at the end of such period of six months unless within such period such person shall make application in writing for the continuance of all or any part of such insurance and shall submit evidence satisfactory to the Administrator of entitlement to waiver of premiums under subsection (n) of this section, or tender the premiums thereafter becoming due."

5. Plaintiff alleges that her son, Ricardo Suarez, was captured by the Imperial Forces of the Empire of Japan, an enemy of the United States, and that he died while a prisoner on June 17, 1942.

6. Plaintiff further alleges that her son, Ricardo Suarez, did not apply for or was granted National Service Life Insurance and was not issued any policy of insurance by the United States prior to his death. That under the provisions of the U. S. statute as alleged in paragraph 4 hereof, he was deemed to have applied for and have been granted insurance in the amount of not less than $5,000 under the War Risk Insurance Act.

7. Plaintiff further alleges that her son, Ricardo Suarez, departed this life surviving him no widow, child or children, and that the plaintiff, as the dependent mother at the time of his death, is the only person within the permitted class entitled to take the proceeds of the automatic insurance herein sued upon and plaintiff further alleges that she was a dependent mother within the meaning and intent of that term as used in the National Service Life Insurance Act and other Acts of Congress granting the automatic insurance herein sued upon.

8. Plaintiff further alleges that there is now justly due and owing to her monthly installments of insurance on the said $5,000 automatic insurance contract the amount thereof to be computed according to the tables of the United States Veterans Administration said installments being payable and accruing from June 17, 1942.

9. Plaintiff further alleges that she was born on April 8, 1892.

10. Plaintiff further alleges that claim for automatic insurance benefits herein sued upon was filed with the United States Veterans Administration on April 25, 1947 and was continuously under consideration until the said claim was fully denied on December 27, 1954 and that a disagreement now exists between the plaintiff and the United States Veterans' Administration as to the plaintiff's right to recover for the automatic insurance herein sued upon.

11. Plaintiff further alleges that because of the refusal of the defendant to pay this just claim, she has been compelled to employ counsel to bring this action and that she has employed Claude L. Dawson, a member of the Bar of this Court, to represent her, and that he is entitled to a reasonable attorney's fee for his services which the plaintiff alleges to be 10% of any amount which she may recover by reason of this action.

WHEREFORE, the plaintiff demands judgment against the defendant for monthly installments of insurance on the said $5,000 automatic insurance contract commencing on June 17, 1942 and for each and every month thereafter until date of judgment, said installments to be computed upon the age of the plaintiff at the time of death of the insured according to the tables of insurance of the United States Veterans Administration and in such amounts as may be justly due her, and further that the Court fix and determine a reasonable attorney fee for her counsel of record in an amount not exceeding 10% of the amount received by the plaintiff as a result of this action.

(s) EPIFANIA P. VDA. DE SUAREZ,
Plaintiff.

(s) CLAUDE L. DAWSON,
Attorney for the Plaintiff,
1012-14th Street, N.W.,
Washington 5, D.C.

ANSWER

(Filed April 13, 1956)

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 659-56

EPIFANIA P. VDA DE SUAREZ, PLAINTIFF,

v.

UNITED STATES OF AMERICA, DEFENDANT

DEFENDANT'S ANSWER

Comes now the defendant, the United States of America, by its Attorney, Oliver Gasch, United States Attorney in and for the District of Columbia, and for answer to the complaint herein filed says:

FIRST DEFENSE

The Court does not have jurisdiction to entertain this suit because it was not brought within six (6) years after the right accrued for which the claim is made, as provided by Sections 445 and 817, Title 38 U. S. C.

SECOND DEFENSE

(1) The defendant admits the allegations contained in Paragraphs 1 to 6, inclusive, except that it says that the statutory provision cited in Paragraph 4, is contained in Section 802 (d)(3)(B) of Title 38, U. S. C., rather than Section 802(B).

(2) The defendant admits the allegations of Paragraph 7, except that it denies that the plaintiff was dependent upon her son, Ricardo Suarez, for support, within the meaning of that term as used in 38 U. S. C. 802 (d)(2)(C).

(3) The defendant denies the allegations of Paragraph 8.

(4) The defendant denies the allegation of Paragraph 9,

and, in further answer thereto, says that in both her original claim for insurance and the baptismal certificate submitted in connection therewith the date of the plaintiff's birth was shown as July 12, 1892, and not April 8, 1892.

(5) The defendant admits the allegations of Paragraph 10 that the plaintiff's claim for insurance benefits was filed with the Veterans Administration on April 25, 1947, and that a disagreement now exists between the plaintiff and the Veterans Administration respecting the claim herein sued upon. In further answer thereto, the defendant says that the said claim was denied on March 3, 1952, on the ground that the evidence did not establish that the plaintiff was dependent on the veteran on the date of his death; that on March 18, 1953, the Board of Veterans Appeals affirmed the said finding and that on June 12, 1953, the plaintiff was informed that the decision of the Board of Veterans' Appeals constituted final administrative action on the claim; that on October 27, 1953, the plaintiff submitted what was purported to be new evidence, and that on November 12, 1953, she was notified that this additional evidence did not warrant a change of the Board of Veterans Appeals' decision; that in response to further letters from the plaintiff requesting reconsideration of her claim, she was informed, by letters of October 12, 1954 and December 27, 1954, that the denial of her appeal by the Board of Veterans' Appeals constituted final administrative action on her claim.

(6) In answer to the allegations of Paragraph 11, of the plaintiff's complaint, the defendant says that the matter of what constitutes a reasonable fee for the plaintiff's attorney, in the event of her recovery, is one for the Court to determine, pursuant to 38 U. S. C. 551.

WHEREFORE, defendant having fully answered prays:

(1) That the Court discharge the defendant from any and all liability in the premises.

(2) For its costs and such further relief as to the Court may seem proper.

Dated this 13th day of April, 1956.

/s/ Oliver Gasch,
United States Attorney,

/s/ Edward P. Troxell,
Principal, Assistant United States Attorney,

/s/ David B. Goldberg,
Attorney, Department of Justice,
Attorneys for the Defendant,
United States of America.

Certificate of Service

I hereby certify that service of the foregoing answer was made upon the plaintiffs by mailing of copies thereof to:

Claude L. Dawson, 1012 14th Street, N. W., Washington 5, D. C., Attorney for the plaintiff, this 13 day of April, 1956.

David B. Goldberg,
Attorney, Department of Justice.

MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

(Filed October 25, 1957)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 659-56

EPIFANIA P. VDA DE SUAREZ, PLAINTIFF,

v.

UNITED STATES OF AMERICA, DEFENDANT

MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

Comes now the defendant, the United States of America by its counsel, and moves the court to dismiss this action with prejudice or enter judgment for the defendant on the following grounds:

I

The court does not have jurisdiction to entertain plaintiff's claim for insurance benefits because suit has not been brought within the time required by 38 U.S.C. 445 and 817.

In support of this motion the defendant attaches hereto an affidavit of Peter C. Charuhas, Attorney, Department of Justice, and makes the same a part of this motion the same as if fully stated herein.

Wherefore, this defendant prays that the suit be dismissed with prejudice or, in the alternative, that the court enter judgment in favor of the United States.

/s/ OLIVER GASCH,
United States Attorney,

/s/ EDWARD P. TROXELL,
Principal Assistant
United States Attorney,

/s/ PETER C. CHARUHAS,
Attorney,
Department of Justice,
Attorneys for Defendant,
the United States of America.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

(Filed October 25, 1957)

Civil Action No. 659-56

EPIFANIA P. VDA DE SUAREZ, PLAINTIFF,

v.

UNITED STATES OF AMERICA, DEFENDANT

AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS

Personally appeared before me, the undersigned authority for administering oaths, Peter C. Charuhas, Attorney, Department of Justice, who being duly sworn, deposes and says:

I am an attorney in the Veterans Affairs Section of the Civil Division, Department of Justice, and, in such capacity, I have in my custody the file of the Veterans Administration pertaining to the deceased insured, Ricardo P. Suarez (XC-6 388 869), and I have reviewed and examined the said file and find that it discloses the following facts:

1. That Ricardo P. Suarez, hereinafter referred to as the insured, entered on duty with the Armed Forces of the United States in the Philippine Islands on December 8, 1941, and died while in said service on June 17, 1942.

2. That there is no record of the insured's having applied for or being granted Government life insurance, but by virtue of his service he is deemed to have been granted $5,000 gratuitous National Service Life Insurance under the provisions of 38 U.S.C. 802(d)(3)(B).

3. That claim for death benefits under the gratuitous National Service Life Insurance was filed with the Veterans Administration by the plaintiff on April 25, 1947 (attached Exhibit A); that this claim was denied on April 3, 1952 (attached Exhibit B); and an appeal filed on November 6, 1952 (attached Exhibit C); that on March 18, 1953,

Board of Veterans Appeals denied the appeal and the plaintiff was advised the same date (attached Exhibit D); that on June 1, 1953 (attached Exhibit E) the plaintiff requested a reconsideration of the claim and said claim was again denied on June 12, 1953 (attached Exhibit F); that the plaintiff for the second time requested reconsideration of the claim on August 5, 1953 (attached Exhibit G) and this request was denied on November 12, 1953 (attached Exhibit H); that for the third time the plaintiff on March 29, 1954 (attached Exhibit I) sought reconsideration of the claim and it was denied on October 12, 1954 (attached Exhibit J); that still another claim for reconsideration (attached Exhibit K) was filed on November 23, 1954 and this claim was denied on December 27, 1954 (attached Exhibit L).

PETER C. CHARUHAS,
Attorney, Department of Justice.

Subscribed and sworn to before me this 25 day of October, 1957.

/s/ MARY J. TURNER,
Notary Public.

My commission expires July 31, 1959.

EXHIBIT A

(Filed October 25, 1957)

VETERANS ADMINISTRATION

CLAIMS FOR NATIONAL SERVICE LIFE INSURANCE

(Under Public Laws 360 and 667, 77th Congress)

(Please read carefully before executing)

I, Epifania Paquing Quing, receiving mail at Fabrica, Neg. Occ. P. 1., believe myself to be the beneficiary of the insurance granted by the United States to Ricardo Suarez, who died 17 June, 1942.

In support of my claim to such insurance I make the following statements: I was born on 12 July, 1892. My relationship to the deceased is that of mother.

If the beneficiary is the widow or widower of the deceased, it will be necessary to answer the following questions:

(a) How many times had deceased been married? not app.

(b) How many times have you been married?——

(c) Have you remarried since death of deceased?——

The only surviving relatives of the deceased within the classes of widow and widower; children (including adopted children); mother and father (including mothers and fathers through adoption and persons who have stood in loco parentis to the serviceman at any time for a period of not less than one year prior to the serviceman's entry into active service; are as follows:

Name: Epifania Paquing Quing
Relationship: mother
Age: 54
Address: Fabrica, Neg. Occ. P. 1.

Name: Jovencio Suarez
Relationship: Father
Age: 62
Address: Fabrica, Neg. Occ. P. 1.

I certify that the forgoing statments are true to the best of my knowledge and belief.

The statements contained herein are made with full knowledge of the penalties imposed by law for making a false statement of a material fact.

(s) EPIFANIA PAQUING QUING,
Beneficiary.

VETERANS ADMINISTRATION

Claims for National Service Life Insurance

(Under Public Laws 360 and 667, 77th Congress)

(Please read carefully before executing)

I, Jovencio Suarez, receiving mail at Fabrica, Neg. Occ. P. 1, believe myself to be the beneficiary of the insurance granted by the United States to Ricardo Suarez, who died 17 June 1942.

In support of my claim to such insurance I make the following statements: I was born on Feb. 8, 1885. My relationship to the deceased is that of father.

If the beneficiary is the widow or widower of the deceased, it will be necessary to answer the following questions:

(a) How many times had deceased been married? Not app.
(b) How many times have you been married? ——
(c) Have you remarried since death of deceased? ——

The only surviving relatives of the deceased within the classes of widow and widower; children (including adopted children); mother and father (including mothers and fathers through adoption and persons who have stood in loco parentis to the serviceman at any time for a period of not less than one year prior to the serviceman's entry into active service; are as follows:

Name: Jovencio Suarez
Relationship: father
Age: 62
Address: Fabrica, Neg. Occ. p. 1.
Name: Epifania Paquing Quing
Relationship: mother
Age: 54
Address: Fabrica, Neg. Occ. p. 1.

I certify that the foregoing statements are true to the best of my knowledge and belief.

The statements contained herein are made with full knowledge of the penalties imposed by law for making a false statement of a material fact.

(s) JOVENĆIO SUAREZ,
Beneficiary.

EXHIBIT B

(Filed October 25, 1957)

VETERANS ADMINISTRATION

Washington 25, D. C.

April 3, 1952

8BAAE

XC 6 388 869
SUAREZ, Ricardo P.

Mr. Jovencio Suarez,
Mrs. Epifania Paquingping de Suarez,
Fabrica, Negros Occidental, Philippines.

DEAR MR. AND MRS. SUAREZ:

Your claim for gratuitous National Service Life Insurance has been considered under all applicable laws and is denied for the reason(s) designated below by a cross (X) mark.

☒ 1. The evidence of record shows you were not "dependent" within the meaning of the law on the date of the veteran's death which occurred on June 17, 1942 since your income was sufficient for your reasonable maintenance and support.

☐ 2. The evidence of record shows that you are not the preferred beneficiary, since the veteran was survived by a

☐ 3. Your claim was not filed within seven years from date of the veteran's death on which is a requirement under existing law.

☐ 4.

If you have no further evidence to submit but have substantial reason to believe that the above decision is not in accordance with the law and the facts in your case, you may appeal to the Administrator of Veterans Affairs at any time

within one year from the date of this letter or you may institute legal action under Section 817, Title 38, U. S. Code.

Very truly yours,

Thru Manila Sub Office

R. J. HINTON,
Director,
Dependents and Beneficiaries Claims Service.

FL 8-124

Nov. 1950

EXHIBIT C

(Filed October 25, 1957)

Veterans Administration

Form I—9 Rev. Sept. 1945

CLAIMANT'S APPEAL TO ADMINISTRATOR OF VETERANS' AFFAIRS

Claim No. XC 6 388 869

SUAREZ JOVENCIO R.

1. I, SUAREZ EPIFANIA PAQUINGQUING DE, hereby appeal from the decision rendered on my claim on April 3, 1952 by the Veterans Administration at Washington 25, D.C., U.S.A. and request a review of my claim which is based on the service performed by RICARDO P. SUAREZ, rank Private "A" Co., 71st Regt. organization 71st Div. USAFFE during WARTIME.

2. If the claimant is a person other than the veteran upon whose service this claim is based, state the relationship to such veteran PARENTS.

3. A hearing on this appeal will be accorded the appellant or his representative if desired.

4. Outline the alleged errors of fact or law in the decision from which the appeal is taken; for example, if the appeal is for service connection, the disabilities which are believed to be service connected should be named and the facts supporting appellant's contentions should be set forth. If the appeal is for a higher rating, each disability believed to be causing increased disability should be named. Attach additional sheets if necessary.

I—DECISION APPEALED FROM: Denial of claim for Gratuitous National Service Life Insurance for reason that claimants were not dependent within the meaning of the law on the date of the Veteran's death on June 17, 1942.

II—BASIS OF APPEAL: Errors of Facts.

Petition

Comes now the undersigned appellants and petitioners before the Director, Dependents and Beneficiaries Claims Service, Washington 25, D.C. respectfully states:

That the Veterans Administration has erred in the decision rendered:

That we were dependent upon the support of our deceased veteran son Ricardo P. Suarez from the time before his call to active duty into the military service (USAFFE) until his death, and after his death, we had been dependent for our support from our son-in-law, Carlos Tiangson of Fabrica, Negros Occidental.

That on August 1, 1950 we have executed a petition for the above entitled case for the disallowance of pension benefits due us, per letter of Director, Dependents and Beneficiaries Claims Service, Washington 25, D.C. dated May 26, 1950, and on November 20, 1951 letter from the same.

Jovencio Suarez,
(s) Epifania Paquing Quing de Suarez.

October 28, 1952.

Fabrica, Negros Occidental, Philippines.

EXHIBIT D

(Filed October 25, 1957)

March 18, 1953

1CAA

XC–6 388 869

SUAREZ, Ricardo

Mr. Jovencio R. Suarez,
Mrs. Epifania Paquingquing de Suarez,
Fabrica, Negros Occidental,
Philippines.

REGISTERED MAIL

DEAR MR. AND MRS. SUAREZ:

Decisions have been entered by the Board of Veterans Appeals in connection with the appeals submitted for death compensation and insurance benefits in this case. Copies are enclosed for your information.

Very truly yours,

R. L. JARNAGIN,
Chairman,
Board of Veterans Appeals.

Encls. 2

REGISTRY CLERK 573841
REGISTRY No. ——

LCH:jaa

VETERANS ADMINISTRATION

Board of Veterans Appeals

March 18, 1953

Docket No. 214 510

SUAREZ, Ricardo,
Claim No. XC-6 388 869

Jovencio R. Suarez,
Epifania Paquingquing de Suarez,
Fabrica, Negros Occidental,
Philippines.

Nat'l. Serv. Life Ins. Act, 1940, as amended Grat. Ins. (Dep.) Denied

QUESTION AT ISSUE: Dependency of the appellants, Jovencio R. Suarez and Epifania Paquingquing de Suarez, parents of the deceased veteran, for the purpose of gratuitous National Service Life Insurance benefits.

CONTENTIONS: The appellants contend that they were dependent within the meaning of existing laws and regulations at the time of their son's death, and reference is made to certain evidence submitted with their appeal.

OUTLINE OF MATERIAL EVIDENCE: The Department of the Army has reported that the veteran entered active service on December 8, 1941 and died in service on June 17, 1942. The records do not show that the veteran applied for or was granted any National Service Life Insurance.

The appellants filed claim for gratuitous insurance benefits as dependent parents of the deceased veteran. In connection therewith they submitted affidavits dated April 25, 1947 showing their joint income for the three month period immediately preceding and including the date of the veteran's death to be $30 monthly, derived from contributions of a son-in-law, with expenses indicated to be of equivalent amount.

There is of record a certificate from the Office of the Municipal Treasurer, Sagay, Negros Occidental, together with affidavits of Domingo A. Lobaton, Apolinario Malundo, Sixto Villanueva and Alejo Anoche.

Essential Elements for Entitlement: Under existing laws and regulations, dependency will not be held to have existed unless it is shown that the income of the claimants at the time of the veteran's death was insufficient for their reasonable support and maintenance.

Discussion and Decision: From a careful review of the entire record, the Board finds that the appellants have not shown that the income available to them at the time of the veteran's death was insufficient for their reasonable support and maintenance. Accordingly, they are not considered to have been dependent within the meaning of existing laws and regulations. The appeal is, accordingly, denied and this decision constitutes final administrative denial of this claim.

(s) Alex Brooks, M.D.
Associate Member.

(s) R. S. Trimble,
Associate Member.

(s) Ralph L. Chambers,
Associate Member.

EXHIBIT E

(Filed October 25, 1957)

U. S. VETERANS ADMINISTRATION

Washington 25, D.C., U.S.A.

8BAAE; XC 6 388 869
SUAREZ, Ricardo P.

APPEAL FOR RECONSIDERATION OF DECISION BY DIRECTOR, DEPENDENTS AND BENEFICIARIES CLAIMS SERVICE

BY: JOVENCIO SUAREZ AND EPIFANIA PAQUINGQUING DE SUAREZ, PARENTS OF DECEASED VETERAN RICARDO P. SUAREZ

I. DECISION APPEALED FROM: Denial of claim for Gratuitous National Service Life Insurance for reason that claimants were not dependent within the meaning of the law on the date of the veteran's death on June 17, 1942.

II. BASIS OF APPEAL: Errors of Facts.

PETITION

COMES now the undersigned appellants and petitioners before the Director, Dependents and Beneficiaries Claim Service, Washington 25, D.C., respectfully states:

That the Board of Veterans Appeals has erred in the decision rendered;

That our deceased son RICARDO P. SUAREZ entered active military service on December 8, 1941 and died in the same service on June 17, 1942. Negros Island where the appellants reside is far from Bataan where our son was serving, and that there was no means of communication whatsoever between the two above places. We are sure, if there was opportunity, our son would send his help to us from Bataan. If we were dependent upon him for our livelihood

before his entrance to active military service, we surely were dependent upon him when he entered the military service, only that he could not send his salary to help us. This allegation is supported by fact that from the time the Japanese attacked the Philippines there was no more means of communications especially from one island to another. We had to beg from our son-in-law, Carlos Tiangson, and kindly contributed in kind to our daily bread in order that we could exist, to the estimated value of $30 monthly. Had not our son-in-law been charitable enough we would have died of hunger and consequently we could not have applied for any benefits due to the death of our son, Ricardo P. Suarez.

Under the existing laws and regulations, dependency will not be held to have existed unless it is shown that the income of the claimants, at the time of the veteran's death was insufficient for their reasonable support and maintenance. From this point of view we have submitted evidences that we did not have any income. We only depended from the charity of our son-in-law, in kind, but not having any income. Our son-in-law, Carlos Tiangson, died of T.B. sometime in December, 1952.

Whereof, in view of the above reasons, we respectfully pray for the reconsideration of the denial of our claim.

In Witness Whereof, we have hereunto affixed our signatures this 12th day of May, 1953 at Sagay, Negros Occidental, Philippines.

(s) Jovencio Suarez,
Claimant.

(s) Epifania Paquing Quing De Suarez,
Claimant.

REPUBLIC OF THE PHILIPPINES,
Province of Negros Occidental,
Municipality of Sagay, ss:

SUBSCRIBED AND SWORN TO BEFORE ME, this 12th day of May, 1953 at Sagay, Negros Occidental, Philippines by above affiants to whom the statements herein were fully made known and explained and I certify that each and every paragraph therein was read to them and that they fully understand the penalties provided by law for any false statement to a material fact.

(s) VICTORINO G. CRUZ,
Notary Public.

Until December 31, 1953.

U. S. VETERANS ADMINISTRATION

Washington 25, D.C., U.S.A.

8BAAE; XC 6 388 869
SUAREZ, Ricardo P.

APPEAL FOR RECONSIDERATION OF DECISION BY DIRECTOR, DEPENDENTS AND BENEFICIARIES CLAIMS SERVICE

BY: JOVENCIO SUAREZ AND EPIFANIA PAQUINGQUING DE SUAREZ, PARENTS OF DECEASED VETERAN RICARDO P. SUAREZ

I. DECISION APPEALED FROM: Denial of claim for Retroactive Pension, Public Law 195, 81st Congress.

II. BASIS OF APPEAL: Errors of Facts.

PETITION

COMES now the undersigned appellants and petitioners before the Director, Dependents and Beneficiaries Claims Service, Washington 25, D.C., respectfully states;

That the Board of Veterans Appeals has erred in decision rendered;

That we were miserably living from the date of death of our deceased veteran son and did not have any income sufficient for our reasonable support and maintenance until sometime in April, 1947. Some charitable friends of the father of the veteran who had a temporary investment on that date kindly allowed and employed the veteran's father, Jovencio Suarez, for a limited period of time until about the end of 1948 when the investment was automatically cancelled. The Sagay Construction Company constructed a temporary bridge across the Himoga-an River, Sagay, Negros Occidental, Philippines, and was allowed to charge vehicles crossing the river by means of the temporary bridge. About the end of 1948 the bridge of the government was finished and vehicles passed through the government bridge, rendering the temporary bridge of the Sagay Construction Company useless and of no income.

In view of the above circumstances, and evidences already submitted, we are still of the opinion that we are entitled to the compensation from the date of death of our veteran son, even if the period from April 25, 1947 to the later part of 1948 will be excluded.

WHEREOF, we respectfully pray for the fairness and justice sake, the reconsideration of the denial of our claim.

IN WITNESS WHEREOF, we have hereunto affixed our signatures this 12th day of May, 1953 at Sagay, Negros Occidental, Philippines.

(s) JOVENCIO SUAREZ,
Claimant.

(s) EPIFANIA PAQUING QUING DE SUAREZ,
Claimant.

REPUBLIC OF THE PHILIPPINES,
Province of Negros Occidental,
Municipality of Sagay, ss:

SUBSCRIBED AND SWORN TO BEFORE ME, this 12th day of May, 1953 at Sagay, Negros Occidental, Philippines by above affiants to whom the statements herein were fully made known and explained and I certify that each and every paragraph therein was read to them and that they fully understand the penalties provided by law for any false statement to a material fact.

(s) VICTORINO G. CRUZ,
Notary Public. Until December 31, 1953.

EXHIBIT F

(Filed October 25, 1957)

VETERANS ADMINISTRATION

Washington 25, D. C.

June 10, 1953

8BAC

XC– 6 388 869
SUAREZ, Ricardo P.

Mr. Jovencio R. Suarez,
Mrs. Epifania Paquingquing de Suarez,
Fabrica, Negros Occidental,
Philippines.

DEAR SIR AND MADAM:

Reference is made to your affidavit of 5-12-53 regarding the denial of your appeal from the disallowance of your claim for gratuitous insurance benefits.

Attention is invited to the paragraphs checked below:

☐ 1. This matter is receiving our attenion. Further action awaits evidence which is being obtained by this office.

☐ 2. You will be further advised at the earliest possible date.

☐ 3. The enclosed copy of correspondence is self-explanatory.

☐ 4. The enclosed evidence is no longer required and is returned to you.

☐ 5. The enclosed form(s) should be executed and returned promptly to this office in order that further action may be taken in the matter.

☒ 6. As you were informed by the Board of Veterans Appeals, the denial of your appeal constitutes

final administrative action on your claims, and no further consideration by this office is in order.

Very truly yours,

R. J. Hinton,
Director,
Dependents and Beneficiaries Claims Service.

FL 8-96

May 1948

EXHIBIT G

(Filed October 25, 1957)

Fabrica, Negros Occidental

Philippines

July 27, 1953

XC– 6 388 869
SUAREZ, Ricardo

Chairman,
Board of Veterans Appeals,
Veterans Administration,
Washington 25, D.C.

SIR:

This has reference to our claim for gratuitous National Service Life Insurance as the dependent parents of the veteran named-above, which was previously disallowed by the Director, Dependents & Beneficiaries Claims Service, Veterans Administration, Washington 25, D.C. for the reason that we were not dependent upon the meaning of the law. An appeal has been certified to that Honorable body, yet in view of evidence that doesn't warrant a change of the decision, the Board finds that the decision rendered is confirmed.

In this connection, in view of the fact that I have at present a new and material evidence to support the allegations that we were dependents upon the meaning of the law, we wish to manifest and would like to secure the permission of that august body that we be allowed to submit the said new and material evidence as stated above.

Wherefore, in the light of the foregoing considerations, we pray further, that early and preferential attention be given hereon, we remain

Very respectfully yours,

(s) JOVENCIO R. SUAREZ,
(s) EPIFANIA PAQUING QUING DE SUAREZ.

EXHIBIT H

(Filed October 25, 1957)

VETERANS BENEFITS OFFICE

VETERANS ADMINISTRATION

Munitions Building

Washington 25, D. C.

November 12, 1953

3072-8BBB

XC 6 388 869
SUAREZ, Ricardo P.

Mr. Jovencio R. Suarez,
Mrs. Epifania P. De Suarez,
Fabrica, Negros Occidental,
Philippines.

DEAR MR. AND MRS. SUAREZ:

Reference is made to your letter dated October 19, 1953 concerning your claims for death compensation under Public Law 195, 81st Congress and gratuitous National Service Life Insurance in this case.

Attention is invited to the paragraphs checked below:

☐ 1. This matter is receiving our attention. Further action awaits evidence which is being obtained by this office.

☐ 2. You will be further advised at the earliest possible date.

☐ 3. The enclosed copy of correspondence is self-explanatory.

☐ 4. The enclosed evidence is no longer required and is returned to you.

☐ 5. The enclosed form(s) —— should be executed and returned promptly to this office in order that future action may be taken in the matter.

☒ 6. The evidence submitted has been considered but warrants no change in the previous action taken. The denial of your appeals from disallowance of your claims for National Service Iife Insurance and death compensation prior to January 1, 1949, constitutes final administrative action.

Very truly yours,

E. H. Callahan,
Acting Chief, Dependents Division.

jwb

EXHIBIT I

(Filed October 25, 1957)

Fabrica, Negros Occidental

Philippines,

March 29, 1954

XC 6 388 869
SUAREZ, Ricardo P.

Acting Chief,
Dependents Division,
Veterans Administration,
Washington 25, D. C.

SIR:

This has reference to your letter dated March 9, 1954 in which you informed me that no change is warranted in the previous decisions of that office disallowing my claim for gratuitous National Service Life Insurance. In this case, therefore I could then express that justice was not accorded me because before God and Man, I am not as what you have expected me as what appeared in our previous erroneous claim papers submitted to that office affecting our dependency to the veteran.

I am herewith sending you VA Form 8-509 duly executed. Trusting that early action and reconsideration be given my claim.

Thanking you in anticipation for whatever attention given this matter, I remain

Very respectfully yours,

(s) EPIFANIA P. DE SUAREZ

Encl. as stated.

EXHIBIT J

(Filed October 25, 1957)

VETERANS BENEFITS OFFICE

VETERANS ADMINISTRATION

Munitions Building

Washintgon 25, D. C.

October 12, 1954

3072-8BBB
XC 6 388 869
SUAREZ, Ricardo P.

Mrs. Epifania P. Vda. de Suarez,
Fabrica, Negros Occidental,
Philippines.

DEAR MADAM:

Reference is made to your letter dated August 11, 1954, relative to gratuitous National Service Life Insurance.

Attention is invited to the paragraphs checked below:

☐ 1. This matter is receiving our attention. Further action awaits evidence which is being obtained by this office.

☐ 2. You will be further advised at the earliest possible date.

☐ 3. The enclosed copy of correspondence is self-explanatory.

☐ 4. The enclosed evidence is no longer required and is returned to you.

☐ 5. The enclosed forms(s) should be executed and returned promptly to this office in order that further action may be taken in the matter.

☒ 6. As you have been previously informed, the denial of your appeal constitutes final administrative action on your claim. No further action may therefore be taken.

Very truly yours,

E. H. Callahan,
Chief, Dependents Claims Division.

FL 8-96
May 1948
bjg

EXHIBIT K

(Filed October 25, 1957)

Fabrica, Negros Occidental

Philippines,

November 23, 1954

XC–6 388 869
SUAREZ, Ricardo P.

Chairman,
Board of Veterans Appeals,
Veterans Administration,
Washington 25, D. C.

SIR:

This has reference to my claim for gratuitous National Service Life Insurance as the dependent mother of the above named deceased veteran which was recently denied consideration by the original office of jurisdiction and confirmed by that office on the ground that my deceased husband had a sufficient income for his support. However, in view of the fact that the records does not show that I have an income sufficient for my reasonable support, it is further reiterated that reconsideration be given that gratuitous National Service Life Insurance due the estate of the deceased be granted me as the dependent mother of the veteran.

Thanking you in anticipation for whatever attention given this matter, I remain

Very respectfully yours,

/s/ EPIFANIA P. VDA DE SUAREZ.

EXHIBIT L

(Filed October 25, 1957)

December 27, 1954

1CAA

XC-6 388 869
SUAREZ, Ricardo P.

Mrs. Epifania P. Vda de Suarez,
Fabrica, Negros Occidental,
Philippines.

DEAR MRS. SUAREZ:

This will acknowledge receipt of your letter of November 23, 1954, regarding your insurance claim in the above-captioned case.

The Board's determinination was made on the record in its entirety that the evidence did not establish your dependency during the relevant period in question and the appeal was denied.

It is provided by law that claims for benefits administered by this Administration are subject to one review on appeal to this Board. Since such review has been accorded your claim, no further action is indicated by this office.

Very truly yours,

R. L. JARNAGIN,
Chairman Board of Veterans Appeals.

Sent thru Manager, VARO, Manila, Philippines thru Foreign Affairs Division.

GUB:kss

ORDER DENYING DEFENDANT'S MOTION TO DISMISS OR IN THE ALTERNATIVE FOR A SUMMARY JUDGMENT

(Filed November 4, 1957)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 659-56

EPIFANIA P. VDA DE SUAREZ, PLAINTIFF,

v.

UNITED STATES OF AMERICA, DEFENDANT

ORDER DENYING DEFENDANT'S MOTION TO DISMISS OR IN THE ALTERNATIVE FOR A SUMMARY JUDGMENT

The motion of the defendant to dismiss this action or in the alternative for a summary judgment coming on to be heard by the Court, and the Court having heard the argument of counsel, and being fully advised in the premises, it is this 4 day of November 1957,

ORDERED, that the motion of the defendant to dismiss this action or in the alternative for a summary judgment be, and the same is hereby denied.

/s/ ALEXANDER HOLTZOFF,
United States District Judge.

Approved as to form:

PETER C. CHARUHAS,
Attorney Department of Justice,
Attorney for the defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed November 6, 1958)

Harry M. Hull, Clerk

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 659-56

EPIFANIA P. VDA DE SUAREZ, PLAINTIFF,

v.

UNITED STATES OF AMERICA, DEFENDANT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause coming on for hearing before the Court this 3rd day of November, 1958, and the Court having heard all of the evidence offered by the parties, and the argument of counsel, and being fully advised in the premises, makes the following

FINDINGS OF FACT

1. That the plaintiff is a citizen of, and resident of, the Philippine Islands, and brings this suit in accordance with the provisions of the National Service Life Insurance Act.

2. That Ricardo Suarez, the son of the plaintiff, entered into the military service of the United States on December 8th, 1941, and died while in said military service on June 17, 1942.

3. That while the said Ricardo Suarez was in the military service, and pursuant to Section 802 (d) (3) (B) of Title 38 of the United States Code, he was insured by the said defendant in the sum of Five Thousand ($5,000.00) payable to his dependent parents.

4. That Jovencio Suarez, the father of Ricardo Suarez, survived him but died prior to the institution of this action.

5. That Ricardo Suarez was never married during his lifetime, and that the only persons within the permitted class of beneficiaries surviving him was his father and mother.

6. That a claim for the insurance herein sued upon was filed by the plaintiff with the United States Veterans Administration on April 25, 1947, and that the same was continuously under consideration until the said claim was denied on December 27, 1954.

7. That the plaintiff was born on April 8, 1892.

8. That the plaintiff, Epifania Suarez, was a dependent parent within the meaning of that term as contained in the insurance granted to Ricardo Suarez.

9. That Claude L. Dawson, as attorney for the plaintiff, is entitled to a reasonable attorney's fee which the Court finds to be ten (10%) per cent of any amount that the plaintiff may recover by reason of this action.

Upon the foregoing findings of fact, the Court makes the following:

Conclusions of Law

1. That this Court has jurisdiction over the parties, and the subject matter of this litigation.

2. That the plaintiff, Epifania Suarez, is entitled to a judgment against the defendant, United States of America, for monthly installments of insurance commencing on June 17, 1942, payable under the provisions of Section 802 (d) (3) (B) of Title 38 of the United States Code as the dependent mother of Ricardo Suarez, the amount to be computed and paid by the United States Veterans Administration in accordance with their regulations.

3. That Claude L. Dawson, Attorney for the plaintiff, 1049 Shoreham Building, Washington 5, D. C. is entitled to a reasonable attorney's fee in the amount of ten (10%)

per cent of any amount which the plaintiff may recover by reason of this action.

Let judgment be entered accordingly.

/s/ Edward M. Curran,
District Judge.

November 4, 1958.

A True Copy.

Test: Harry M. Hull, Clerk,

By Anne W. Lyddone,
Deputy Clerk.

JUDGMENT

(Filed November 6, 1958)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 659-56

EPIFANIA P. VDA DE SUAREZ, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

JUDGMENT

The above entitled cause coming on for hearing before the Court, and the Court having heard all of the evidence, and the argument of counsel, and being fully advised in the premises, and further having made findings of fact, and conclusions of law in favor of the plaintiff, and against the defendant, it is this 4th day of November, 1958,

ORDERED, ADJUDGED and DETERMINED, that the plaintiff Epifania Suarez have and recover against the defendant, United States of America, monthly installments of insurance on the insurance granted to her son, Ricardo Suarez, under the provisions of Title 38, Section 802 (d) (3) (b) of the United States Code commencing on June 17, 1942, and continuing until date of judgment herein, as the dependent mother of Ricardo Suarez, the amount due the plaintiff to be computed and paid to her by the United States Veterans Administration, and it is further

ORDERED and ADJUDGED, that the United States Veterans Administration deduct from the payments to be made to the plaintiff the sum of ten (10%) of all payments made by reason of this action and pay the same to Claude L. Dawson, Attorney for the Plaintiff, 1049 Shoreham Build-

ing, Washington 5, D. C. as a reasonable attorney's fee for his services.

/s/ EDWARD M. CURRAN,
District Judge.

A True Copy.

Test: Harry M. Hull, clerk,

By ANNE W. LYDDONE
Deputy Clerk.

Approved as to form:

/s/ PETER C. CHARUHAS,
Attorney, for Defendant United States of America.

NOTICE OF APPEAL

(Filed January 2, 1959)

Notice of Appeal, 73(b)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 659-56

EPIFANIA P. VDA DE SUAREZ, PLAINTIFF,

v.

UNITED STATES OF AMERICA, DEFENDANT

NOTICE OF APPEAL

Notice is hereby given this 2nd day of January, 1959, that Defendant, United States of America, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 4th day of November, 1958 in favor of plaintiff EPIFANIA P. VDA DE SUAREZ, against said defendant, United States of America.

/s/ ELLEN LEE PARK,
Defendant,

ELLEN LEE PARK,
Attorney for Assistant United States Attorney.

Copy mailed to:

CLAUDE L. DAWSON, ESQUIRE,
1049 Shoreham Building,
Washington 5, D. C.

ORDER EXTENDING TIME TO FILE RECORD ON APPEAL

(Filed February 2, 1959)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 659-56

EPIFANIA P. VDA DE SUAREZ, PLAINTIFF,

v.

UNITED STATES OF AMERICA, DEFENDANT

ORDER

It appearing that the record on appeal is due to be filed in the Court of Appeals on February 11, 1959, and

It appearing that the United States Attorney, as attorney for the defendant, has requested that the time for filing the record be extended to and including April 2, 1959 for the reason that the Solicitor General has not yet approved prosecution of the appeal, and

It appearing that this Court under Rule 73(g) of the Federal Rules of Civil Procedure

> in its discretion and with or without motion or notice may extend the time for filing the record on appeal and docketing the appeal, if its order for extension is made before the expiration of the period for filing and docketing as originally prescribed or as extended by a previous order.

it is this 2nd day of February, 1959,

ORDERED that the time for filing the record on appeal be and it hereby is extended to and including April 2, 1959.

/s/ MATTHEW F. MCGUIRE,
Judge.

Copy sent to:

CLAUDE L. DAWSON, ESQ.
1049 Shoreham Building,
Washington 5, D. C.
Attorney for plaintiff.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1959 805739 1459